SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 426

INTERCOUNTY OPERATING CORPORATION AND SALONGA FARMS, INC.,

Petitioners,

vs.

COUNTY OF NASSAU

BRIEF IN SUPPORT OF PETITION

---

1. Opinions of the Courts Below

No opinion was rendered in this cause by the County Court of the County of Nassau in granting summary judgment on the pleadings herein, but an opinion (not officially reported) thereafter rendered in connection with a companion case and therein by specific reference made applicable to this cause, is found on pages 38 to 41 of the record in the case of "Grace E. Connolly, Plaintiff-Respondent, against Timothy Curry, et al., etc., Defendants, and Intercounty Operating Corporation, Petitioners (Defendant-Appellant below)," docketed in this Court at the October Term, 1945, as No. 427 and simultaneously herewith

brought up for review by this Court, on a petition for a writ of certiorari. The memoranda of the Appellate Division for the Second Judicial Department, modifying the judgment as to costs and as so modified, affirming the judgment of the Court below, is found on pages 23 to 24 of the record and is officially reported in 268 A. D. (N. Y.) 1067. No opinion was rendered by the Court of Appeals in affirming the judgment of the Appellate Division.

2. Jurisdiction and Statement of the Case

The jurisdictional basis for the petition and the statement of the case are found in the petition, and for the sake of brevity are not repeated here.

3. The Questions Presented

1. Did the 1939 and 1940 purchases of tax liens from the County Treasurer result in contracts with Petitioners upon terms as expressed in the Code?

2. Did the construction and application of the subsequent Code amendments by the State Court of Appeals substantially impair the obligation of Petitioner's contracts?

3. Did the State Legislature in enacting Section 6 of the Laws of New York, 1941, Chapter 679, expressly save and preserve Petitioners' rights under the prior contracts?

4. ARGUMENT (as to Jurisdiction)

POINT A

This Court's denial of a writ of certiorari in the prior action which was brought for a declaratory judgment does not foreclose a consideration of the petition herein, which brings up for review the final determination of the Court of last resort of the State affecting a present justiciable controversy between the parties.

Any one of the compelling considerations enumerated by this Court in *Alabama State Federation of Labor* v. *McAdory*, decided June 11th, 1945, and reported —— U. S. ——, 65 S. Ct. 1384, 1389, 1390, might well have impelled this Court to delay passing upon the constitutionality of the state statute here involved. As is there said: "A law which is constitutional as applied in one manner, may, it is true, violate the Constitution when applied in another." The Court is now presented with a case "involving particular provisions as specifically applied to persons who claim to be injured."

POINT B

The jurisdiction of this Court on a petition for a writ of certiorari is not affected by failure of the State Court to write an opinion, nor by its refusal to certify that questions under the Constitution of the United States had been presented and necessarily passed upon in its determination.

Were the rule otherwise, the State Court could in every case, prevent a review of its own determinations and contravene the remedial purposes of the Judicial Code. While an opinion stating that a state statute was drawn in question is generally sufficient, when consistent with the record, to sustain the jurisdiction of this Court on a direct appeal under 237 (a) of the Judicial Code, jurisdiction to consider the merits under 237 (b) of the Judicial Code is conferred upon this Court, on a petition for a writ of certiorari, where the record shows that appellants have properly and seasonably raised the federal question (*Charlestown Federal S. & L. Assn.* v. *Alderson*, —— U. S. —— 65 S. Ct. 624).

The federal question was here raised by the pleadings (R. 16 to 18) where it was contended that as sought to be applied the Statute was invalid as repugnant to the federal Constitution.

5. ARGUMENT (as to the Merits)

POINT I

The 1939 and 1940 purchases of tax liens from the county treasurer resulted in contracts with petitioners upon terms as expressed in the code.

This Court has held that a taxing statute "• • • taken in connection with the other statutes regulating the acquirement by the State, and the disposition by it, of lands sold for delinquent taxes, constituted, in effect an offer by the State, to those who might become purchasers of such lands; and the protection it afforded to the title acquired by such purchasers necessarily inured to every person acting under it and constituted a contract with him," (*Wood* v. *Lovett,* 313 U. S. 362, 369), and also that "The laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms," (*Von Hoffman* v. *Quincy,* 4 Wall. (U. S.) 535, 550; *Home Building & Loan Asso.* v. *Blaisdell,* 290 U. S. 398, 429).

Hence, as provided by the Code, the Petitioners, upon payment of the purchase price, became vested with the following substantial contract rights:

(1) A right to receive a tax sale certificate describing the property sold for delinquent taxes (Sec. 5-41.0);

(2) A right, after 4 years, to receive the amount paid for the tax sale certificate, plus interest, penalties and costs (Sec. 5-48.0);

(3) A right, to be exercised at their own option, to pay subsequently accruing taxes, and add the amounts so paid to their liens at the same rates of interest, penalties and costs (Sec. 5-49.0);

(4) A right, after 4 years, if the lien was not satisfied by the owner within that time, to a conveyance of the property, which conveyance shall vest in the grantee an absolute estate in fee, subject to the claims of the County for taxes or other liens (Sec. 5-53.0); or to an action in foreclosure, (Sec. 5-60.0), and to a conveyance made pursuant to judgment in such action (Sec. 5-64.0).

Point II

The construction and application of the subsequent code amendments by the State Court of Appeals, substantially impaired, and to all intents and purposes, actually extinguished the obligations of the county treasurer on the one hand and the rights of the petitioners under their contracts on the other.

Article I, Section 10, of the United States Constitution provides that "no State shall * * * pass any * * * Law impairing the Obligations of Contracts."

While there is no absolute freedom of contract and while there may be no objection to legislation restricting the power to make contracts in the future (*Chicago, Burlington & Quincy R. Co.* v. *McGuire,* 219 U. S. 549, 567, 31 S. Ct. 259, 55 L. Ed. 328; *Muller* v. *State of Oregon,* 208 U. S. 412, 421, 28 S. Ct. 324, 52 L. Ed. 551, 13 Ann. Cas. 957) or modifying contracts previously made, as long as substantive rights are substantially preserved (*Home Bldg. & Loan Ass'n* v. *Blaisdell,* 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481; *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, 55 S. Ct. 854, 79 L. Ed. 1593, 97 A. L. R. 1106), any statute which substantially modifies vital terms of a contract already in force destroys and impairs the contract obligation and violates the constitutional provision. That is what the Constitution seeks to prevent, and the courts, including the Supreme Court of the United States, have always opposed such state action, (*Sturges*

v. *Crowninshield,* 4 Wheat. 122, 17 U. S. 122, 4 L. Ed. 529; *Ogden* v. *Saunders,* 12 Wheat. 213, 25 U. S. 213, 6 L. Ed. 606; *Bronston* v. *Kinzie et al.,* 1 How. 311, 42 U. S. 311, 11 L. Ed. 143; *State of Louisiana* v. *Mayor of City of New Orleans,* 109 U. S. 285, 3 S. Ct. 211, 27 L. Ed. 936; *Nelson* v. *Police Jury of St. Martin's Parish,* 111 U. S. 716, 4 S. Ct. 648, 28 L. Ed. 574).

Nothing in *Home Bldg. & Loan Ass'n* v. *Blaisdell,* 290 U. S. 398, 54 S. Ct., 231, 78 L. Ed. 413, 88 A. L. R. 1481, or in any other case changes this settled principle. In the *Blaisdell* case, for instance, there was no attempt to impair substantial rights or obligations and the court itself expressly wrote that the "integrity of the mortgage indebtedness is not impaired" (page 445 of 290 U. S., page 242 of 54 S. Ct., 78 L. Ed. 413, 88 A. L. R. 1481).

Following the Blaisdell decision, the Supreme Court was called upon to treat other legislation which involved the prohibition against impairing contract obligations. In none of them did the court construe or apply a statute in such a manner as the one now being considered (*W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426, 54 S. Ct. 816, 78 L. Ed. 1344, 93 A. L. R. 173; *W. B. Worthen Co. ex rel. Board of Com'rs of Street Imp. Dist. No. 513 of Little Rock, Ark.* v. *Kavanaugh,* 295 U. S. 56, 55 S. Ct. 555, 79 L. Ed. 1298, 97 A. L. R. 905; *Treigle* v. *Acme Homestead Ass'n,* 297 U. S. 189, 56 S. Ct. 408, 80 L. Ed. 575, 101 A. L. R. 1284; *State of Indiana ex rel. Anderson* v. *Brand,* 303 U. S. 95, 58 S. Ct. 443, 82 L. Ed. 685, 113 A. L. R. 1482; *Wood* v. *Lovett,* 313 U. S. 362, 61 S. Ct. 983, 85 L. Ed. 1404; *Veix* v. *Sixth Ward Bldg. & Loan Ass'n,* 310 U. S. 32, 60 S. Ct., 792, 84 L. Ed. 1061; *Gelfert* v. *National City Bank,* 313 U. S. 221, 61 S. Ct. 898, 85 L. Ed. 1299, 133 A. L. R. 1467).

In *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426, 54 S. Ct. 816, 78 L. Ed. 1344, 93 A. L. R. 173, an Arkansas statute

exempted the proceeds of life insurance policies from attachment or other process. Holding the Statute unconstitutional so far as it applied to rights acquired before the statute's enactment, the Court said (page 431 of 292 U. S., page 818 of 54 S. Ct., 78 L. Ed. 1344, 93 A. L. R. 173): "Such an exemption, applied in the case of debts owing before the exemption was created by the Legislature, constitutes an unwarrantable interference with the obligation of contracts in violation of the constitutional provision." After referring to the *Blaisdell* case, the court went on (page 433 of 292 U. S., page 818 of 54 S. Ct., 78 L. Ed. 1344, 93 A. L. R. 173): "But we also held that this essential reserved power of the State must be construed in harmony with the fair intent of the constitutional limitations, and that this principle precluded a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them."

In *W. B. Worthen Co. ex rel. Board of Com'rs of Street Imp. Dist. No. 513 of Little Rock, Ark.*, v. *Kavanaugh*, 295 U. S. 56, page 60, 55 S. Ct. 555, 556, 79 L. Ed. 1298, 97 A. L. R. 905, the court held unconstitutional a statute which diminished rights of creditors: "To know the obligation of a contract we look to the laws in force at its making. * * * In the books there is much talk about distinctions between changes of the substance of the contract and changes of remedy. * * * The dividing line is at times obscure. There is no need for the purposes of this case to plot it on the legal map. Not even changes of the remedy may be pressed so far as to cut down the security of a mortgage without moderation or reason or in a spirit of oppression. Even when the public welfare is invoked as an excuse, these bounds must be respected. * * * We state the outermost limits only. In stating them we do not exclude the possi-

bility that the bounds are even narrower. The case does not call for definition more precise."

An examination of these and the other cases indicates that there is no hard and fast rule and no invariable yardstick for reaching a decision; the distinction is often "a matter of degree" (*Martin* v. *District of Columbia*, 205 U. S. 135, 139, 27 S. Ct. 440, 51 L. Ed. 743; *Block* v. *Hirsh*, 256 U. S. 135, 156, 41 S. Ct. 458, 65 L. Ed. 865, 16 A. L. R. 165). "The reasonableness of each regulation depends upon the relevant facts" (*Nebbia* v. *New York*, 291 U. S. 502, 525, 54 S. Ct. 505, 511, 78 L. Ed. 940, 89 A. L. R. 1469). The cases dealing with the mortgage moratorium laws are illustrative. They have been sustained when it appeared that they deprived the mortgagees only of a "chance to get more than the amount of their contracts" (*Gelfert* v. *National City Bank*, 313 U. S. 221, 233-235, 61 S. Ct. 898, 903, 85 L. Ed. 1299, 133 A. L. R. 1467), or when "they were found to preserve substantially the right of the mortgagee to obtain • • • payment of the indebtedness" (*Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 581, 55 S. Ct. 854, 859, 79 L. Ed. 1593, 97 A. L. R. 1106; *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 54 S. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481). They have been stricken down "when it appeared that this substantive right was substantially abridged" (*Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, 581, 55 S. Ct. 854, 859, 79 L. Ed. 1593, 97 A. L. R. 1106; *W. B. Worthen Co. ex rel.* v. *Board of Com'rs of Street Imp. Dist. No. 513 of Little Rock, Ark.* v. *Kavanaugh*, 295 U. S. 56, 55 S. Ct. 555, 79 L. Ed. 1298, 97 A. L. R. 905).

The substantive rights of the Petitioners were by the determination of the State Court of Appeals substantially abridged and preservation of their rights to obtain payment of the indebtedness evidenced by their tax sale certificates

was denied and the obligation completely extinguished, in the manner following:

(1) They were deprived of their right, after 4 years, to receive the amount paid for the tax sale certificate plus interest, penalties and costs.

(2) They were denied the option of paying for subsequently accruing taxes which they could add to their liens and receive in return the amounts paid plus interest, penalties and costs, but, instead, were required to pay to the County, the subsequent purchaser, the amounts paid by it, plus interest, penalties and costs, a burden not contemplated by their contracts.

(3) They were required to make these substantial expenditures at a time well in advance of their right to acquire a conveyance of the premises pursuant to their tax sale contracts and prior to their right to commence an action to foreclose their tax liens.

(4) The penalty for their refusal to accept this unwarranted modification and abridgment of their substantive rights has resulted in the complete destruction of their contracts and the repudiation and extinguishment of the debt evidenced thereby.

Point III

The State Legislature, in enacting Section 6 of the Laws of New York, 1941, Chapter 679, expressly saved and preserved petitioners' rights under their contracts.

The State Legislature, being mindful of the possibility that the Code Amendments might, in certain cases, produce the harsh, oppressive and unconscionable result as is here demonstrated, had deliberately inserted Section 6 thereof, in order to give them a completely prospective operation; save them from abridging in any way the contract rights vested in a purchaser of a tax lien sold at a sale of tax liens held prior to the first day of April, 1941, and thereby pro-

tect the Code Amendments from condemnation under the federal Constitution. On no other basis can the inclusion of Section 6 in the Code Amendments be logically supported.

The determination by the State Court of Appeals construes and applies the Code Amendments as if they did not contain Section 6, which reads as follows:

> "§ 6. All rights and remedies provided for the enforcement of tax liens and the redemption of real property affected by a tax lien sold at a sale of tax liens held prior to the first day of April, nineteen hundred forty-one, shall continue in respect of such tax liens and such real property in the same manner as though this chapter had not been enacted."

In his dissenting memorandum for the Appellate Division, Adel, J., said (R. 24):

> "Appellants' right to conveyances, or foreclosure and sale, in the alternative, was preserved by section 6, chapter 679, of the Laws of 1941. * * * In my opinion it is plain that priority of Appellants' lien is to be preserved. * * * and that the rights which were given to the plaintiff under the judgment on appeal should operate in favor of appellants against the respondent."

Such a construction of the Code Amendments would give them the prospective application expressly intended by the legislature. Even where the intention is in doubt, an impartial and fair application should be given to the general rule against giving retroactive operation to statutes, which, therefore, are to be construed entirely prospective unless the legislative intent to do otherwise is expressly and distinctly declared (*Harvey* v. *Tyler*, 2 Wall. (U. S.) 328; *Fullerton Kreuger Co.* v. *Northern Pacific*, 266 U. S. 435, 437; *Schwab* v. *Doyle*, 258 U. S. 529, 534; *Trustees of Union College*, 129 N. Y. 308; *Matter of Miller*, 110 N. Y. 216; *N. Y. & O. R. R. Co.* v. *Van Horn*, 57 N. Y. 473, 477).

Point IV

The code amendments can and should be construed so as to effectuate the legislative intent, avoid the unjust and oppressive consequences which result from the determination of the State Court and thus bring them in harmony with the Federal Constitution.

Where there are two possible constructions of a statute, that one will be preferred which is liberal in favor of the citizen rather than the State, and which does not produce unfair, arbitrary or oppressive results. This Court has held that: "Taxation is an intensely practical matter, and laws in respect of it should be construed and applied with a view of avoiding, as far as possible, unjust and oppressive consequences" (*Farmers L. & T. Co.* v. *Minnesota*, 280 U. S. 204, 212; *Burnett* v. *Niagara Falls Brewing Co.*, 282 U. S. 648, 654).

The obligations of the contracts here involved are substantial, aggregating in value upwards of $250,000.00. The determination of the State Court of Appeals has resulted in a destruction of the contracts, and a complete repudiation of the debt. Such a harsh and unjust result could not have been intended by the Legislature.

Full and fair effect can be given to the provisions of the Code Amendments and an unconstitutional meaning can be avoided by adopting a construction consonant with the reasoning that the Legislature by inserting Section 6 of Chapter 679 of Laws of New York 1941 intended to give the Code Amendments wholly prospective application as to sales of tax liens held prior to April 1, 1941. So construed they would not produce the unjust and oppressive result complained of, and would be in harmony with the federal Constitution. This Court has the power so to construe them (*Singer Sewing Machine Co.* v. *Brickell*, 233 U. S. 304, 313), and it is its duty to do so (*Porter* v. *Investors Syndicate*,

286 U. S. 461, 470; *Bratton* v. *Chandler*, 260 U. S. 110, 114; 16 Corpus Juris Sec., Constitutional Law, Section 98).

In this cause in which a subdivision of the state government is directly involved as a party plaintiff, no opinion was written and no consideration to the constitutional issue directly presented by the pleadings was given by the court of first instance. (This case was alluded to in an opinion written in connection with a subsequent action, referred to on page 1 of this brief, and now before this Court, as a companion case, wherein the basis for the Court's determination is, in effect, put upon the ground that the Court is confronted with a *fait accompli* because of the existence of the deeds running to the Plaintiff.)

On appeal to the Appellate Division, the memorandum written for modification and affirmance relates only to the question of costs. In the memorandum of dissent by that Court, however, the constitutional question, though not expressed, is clearly implicit, for there the question squarely placed before the Court of Appeals is that of the legislative intent, as expressed in its subsequent enactment, that Petitioners' contract rights acquired under prior legislation be preserved.

On the appeal herein involving a present, justiciable controversy, the State Court of last resort, by its affirmance, without opinion, leaves that question wholly unanswered. It is significant that the constitutional question had previously been left unanswered in the action brought by the present petitioners for a declaratory judgment and for an authoritative construction of the statutes here involved (*Intercounty Operating Corporation and Salonga Farms, Inc.* v. *The County of Nassau*, 293 N. Y. 688).

It is sincerely and earnestly urged that by its failure to write an opinion stating the basis upon which its determination is predicated the State Court of Appeals has created confusion and doubt as to the efficacy of decisions of this

Court to the contrary, in analogous situations and has weakened the protective influence of the federal Constitution. Although on this application for a review of its determination there is no desire to question the motives of the State Court for its silence on a controversial constitutional question, it may be felt that such silence may have been induced by the conflict of interests in an anomalous situation involving a subdivision of the state government. An authoritative expression upon a review of the constitutional issues herein involved is therefore all the more necessary.

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its Appellate Jurisdiction and that to such end a writ of certiorari should issue.

Respectfully,

MORRIS ROCHMAN,
Counsel for Petitioners.

CHARLES H. STOLL,
Of Counsel.